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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Reexamination of the Comparative) MM Docket No. 95-31
Standards for Non-Commercial)
Educational Applicants)

To: The Commission

**JOINT REPLY COMMENTS OF SACRED HEART UNIVERSITY
AND MUSIC MINISTRIES, INC.**

On October 21, 1998, the Federal Communications Commission released a *Further Notice of Proposed Rule Making* in the above-captioned proceeding (the "FNPRM").¹ The FNPRM sought comment on the procedure for choosing among mutually exclusive applications for noncommercial educational ("NCE") broadcast licenses. The FNPRM also proposed options for choosing among competing applications for non-reserved frequencies when at least one of the applicants is an NCE entity. Many parties filed comments regarding these issues, and Sacred Heart University ("Sacred Heart")² and Music Ministries, Inc. ("Music Ministries")³ desire to reply to a number of these comments.

I. Mutually-Exclusive Applications for Reserved NCE Frequencies Must First be Subjected to a Section 307(b) Determination

Whenever there are mutually-exclusive NCE applications for reserved NCE frequencies that

¹ *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, MM Docket No. 95-31, 13 FCC Rcd 21167 (released October 21, 1998).

² Sacred Heart is an accredited educational institution located in Fairfield, Connecticut. It is the licensee of several NCE stations in Connecticut and New York.

³ Music Ministries is the licensee of several NCE stations in Indiana and Illinois.

propose to serve different communities, the Commission must first evaluate the applications under Section 307(b) of the Communications Act to determine if there is a greater need in one community than the other(s) for an NCE broadcaster. The Commission has established standards and a body of case law for determining preferences among different communities for new service.⁴ These standards have been used and could continue to be used in the reserved portion of the FM band to decide between mutually exclusive NCE applicants. The Section 307(b) determination should be dispositive. It is only when a Section 307(b) evaluation is unable to distinguish among competing applicants that the Commission should utilize a point system rather than a lottery, as discussed herein.

II. Mutually-Exclusive Applications for Non-Reserved Frequencies

A. NCE Applicants Should Not Be Excluded From Non-Reserved Channels

NCE applicants should not be prohibited from competing for unreserved frequencies because, as NPR noted, the Commission's purpose in reserving a portion of the spectrum for NCE broadcasters was to promote its development, not to restrict its development.⁵ However, excluding NCE applicants from non-reserved channels would limit the availability of this programming. NPR explains that it is often necessary for NCE broadcasters to utilize non-reserved frequencies "in order to extend public broadcast services to unserved or underserved communities or even to maintain existing levels of service."⁶ In fact, the FNPRM recognizes that "some noncommercial educational radio and television stations may, for technical reasons, have no choice but to operate on unreserved frequencies...Specifically we permit reallocation when reserved band frequencies are unavailable due

⁴ See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

⁵ Joint Comments of National Public Radio, Inc., the Association of America's Public Television Stations and the Corporation for Public Broadcasting ("NPR Comments") at 36-37.

⁶ *Id.* at 37.

to potential interference to either: (1) foreign allocations (Canadian or Mexican) or (2) operations on VHF television Channel 6.”⁷ Therefore, even if the commercial channel is unreserved, the NCE applicant should be permitted to make a showing that due to the interference reasons an NCE use should be preferred over a commercial usage.

B. The Commission Must First Evaluate Applicants in Light of Section 307(b)

If an NCE applicant is competing with commercial applicants for an unreserved channel, the Commission must first evaluate the applications under Section 307(b) of the Communications Act of 1934, as amended. According to Section 307(b), the Commission must distribute licenses among communities to provide a fair, efficient, and equitable distribution of radio services to each community.⁸ Thus, the Commission must first determine whether there is a greater need for the channel to be used by an NCE or commercial broadcaster. In doing so, Sacred Heart and Music Ministries agree with the Comments filed by Arizona Board of Regents for Benefit of the University of Arizona, et al. that the criteria to be considered are as follows:⁹

1. If an NCE applicant would provide a first or second NCE service to an area (based on population served).
2. For radio only, if an NCE applicant would provide an additional NCE service in an area (based on population served) where the ratio of NCE radio service to commercial radio service is less than 1:5.
3. For radio only, if the NCE applicant for an unreserved channel would provide NCE coverage to an area that is not adequately served by NCE stations for

⁷ FNPRM at paragraph 37.

⁸ 47 USC Section 307(b).

⁹ Comments of Arizona Board of Regents for Benefit of the University of Arizona, et al., at 9-10.

technical reasons, such as TV Channel 6 or Mexican/Canadian interference problems.

If an NCE applicant is able to demonstrate under these factors that a greater need exists for NCE service than commercial service on that channel, then the Commission should make a dispositive Section 307(b) determination. However, if the Commission makes such a determination and there are two or more NCE applicants for the same community, then the point system advocated below should be used to decide between the NCE applicants.

If a Section 307(b) evaluation does not conclusively favor either an NCE or a commercial applicant for an unreserved channel, Sacred Heart and Music Ministries support the position set forth in the Comments of Kaleidoscope Foundation, Inc. that the Commission should conduct a lottery among all the applicants.¹⁰ As a variation of Kaleidoscope's Comments, if an NCE applicant wins the lottery and it is the only NCE applicant, then it should be awarded an NCE license.¹¹ If there are multiple NCE applicants and one of the NCE applicants is chosen in a lottery, then the decision amongst the NCE applicants only would revert to a point system. If a commercial applicant wins the lottery, then the license should be subjected to competitive bidding among all applicants, including the NCE applicants.¹² This procedure is superior to a point system attempting to evaluate commercial versus NCE applications because the criteria for the point system would be too difficult to define and compare for such different entities.

III. Mutually Exclusive NCE Applications For a Reserved or Unreserved Frequency That Are Not Resolved by a Section 307(b) Evaluation

A. The Commission Should Adopt a Point System and Reject a Lottery System

¹⁰ Comments of Kaleidoscope Foundation, Inc. at 3.

¹¹ *Id.*

¹² *Id.*

In the event that a Section 307(b) determination fails to award the license, the Commission should refrain from implementing a lottery system to decide among mutually-exclusive applications for reserved NCE frequencies. The Commission should not award such valuable public assets in an arbitrary manner that ignores crucial differences among applicants. As NPR stated in its Comments, “[l]eaving these important licensing decisions to random chance would fail to serve the public interest.”¹³ Even if the Commission implemented a weighted lottery system, an applicant who satisfies none of the statutory lottery preferences could still beat the odds and receive the license over an applicant that is much better qualified.¹⁴ Thus, a lottery system is by its very nature not structured to select the best possible applicant for the frequency, when even if weighted the ultimate decision is left up to chance.¹⁵

Sacred Heart and Music Ministries agree with the many commentators who expressed their concern that lotteries would increase the number of mutually-exclusive applications by encouraging speculative filings for numerous channels in order to better their chances of gaining a license.¹⁶ As NPR points out, so long as they met the minimal level of acceptability, the Commission would then have to evaluate all of these applications in order to verify that they meet the basic qualifications.¹⁷

B. Factors to be Awarded Points

Clearly, the first consideration for the Commission is one under Section 307(b). However,

¹³ NPR Comments at 7.

¹⁴ *Id.* at 7.

¹⁵ See Sound of Life, Inc., et. al., Comments at 3. See also, Dale Jackson Comments (stating that lotteries do not encourage or reward bona fide local groups); National Federation of Community Broadcasters at 4-5 (arguing that lotteries do nothing to ensure that the applicant in the best position to serve the community is selected).

¹⁶ See, e.g., NPR Comments at 8-9; Public Radio for the Front Range at 3; Joint Comments of the Executive Committee of the Trustees of Boston University and WRNI Foundation at 2; Americans for Radio Diversity at 1; Sound of Life, et al. Comments at 2-3; CSN International Comments at 3; National Federation of Community Broadcasters at 4-5.

¹⁷ NPR Comments at 9.

when a Section 307(b) evaluation is not dispositive, for example when the NCE applicants have applied to serve the same community, Sacred Heart and Music Ministries urge the Commission to adopt a point system based on verifiable and objective criteria to ensure that this valuable public asset is awarded to the most deserving applicant. Sacred Heart and Music Ministries agree with commentators who advocated the awarding of points to applicants with the following characteristics:

1. *Finder's Preference.* Several commentators advocate awarding points for a "finder's preference" or "pioneer's preference," and Sacred Heart and Music Ministries agree.¹⁸ Two points should be awarded to applicants who find the NCE channel (*i.e.*, the first the apply for a reserved frequency or first to petition for a unreserved frequency) in recognition of the substantial efforts expended by the applicant to locate the channel and as a means of encouraging further pioneering of new frequencies. "[P]arties should be rewarded for the initiative, effort and expense required to find an available noncommercial frequency and to file an initial application for it. It is simply not fair for one party to make this effort, and have its fruits so easily snatched away by another party who simply reviews the 'cut-off' lists for the next best place to file an application."¹⁹
2. *Local Programming.* When making a public interest determination, a critical factor has historically been the provision of local service.²⁰ Thus, the Commission should award points to applicants who propose to provide locally-oriented programming. Because so much programming today is national in scope, the Commission should reward those broadcasters who are committed to serving the unique needs of their local community. The holding period described below will ensure that such commitments are genuine.
3. *Past Meritorious NCE Broadcast Service.* Sacred Heart and Music Ministries agree that points should be awarded to applicants who have a past record of meritorious NCE broadcast station operation.²¹ Several

¹⁸ Dale Jackson Comments at 2,6 (stating that "the highest preference in that system should be for a finder's preference"); Sound of Life, Inc. et al. Comments at 6, 10; Manuel Pereira Comments at 1; Cornerstone Community Radio, Inc. Comments at 2; Moody Bible Institute of Chicago Comments at 10.

¹⁹ Sound of Life, Inc. et al. Comments at 10. The Comments further explain that the Commission's concern regarding a "land rush" of applications is unfounded due to the fact that NCE entities cannot afford to build stations that will not support themselves due to their strict operating budgets. *Id.*

²⁰ See Joint Comments of Roaring Fork Public Radio Translator, Inc. and Pitkin County, Colorado at 4.

²¹ See Comments of Faith Broadcasting, Inc. at 6; Comments of Houston Christian Broadcasters, Inc. at 12; Comments of Augusta Radio Fellowship Institute, Inc. at 5; Comments of the Moody Bible Institute of Chicago at

commentors point out that the Commission has previously recognized that past broadcasting record is the most reliable gauge of the future service that the broadcaster will provide.²²

By granting credits for the above criteria, the Commission will be awarding licenses to the most deserving applicants who will best serve their communities.

C. Holding Period

In the FNPRM, the Commission proposes the establishment of a holding period for licenses that are awarded based on the point system, during which time the applicant must hold the license and maintain the factors for which it received credits. Sacred Heart and Music Ministries support the Commission's proposal, as do a number of other commentors.²³ First, such a requirement would deter speculators if they were unable to sell their licenses for a profit during the holding period. Second, it would give the point system credibility and integrity. The system would be virtually meaningless and unjust if it awarded a frequency to one applicant over another based upon certain valued characteristics, only to have that applicant shed those characteristics soon after the license was granted.

IV. Conclusion

When trying to decide among competing NCE applications for reserved frequencies or competing NCE and commercial applications for unreserved frequencies, the Commission must first evaluate the applications according to Section 307(b) and award the license if such an evaluation is conclusive. However, if the evaluation fails to distinguish among NCE applicants for a reserved

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²² *Id.*, citing *Wabash Valley Broadcasting Corporation*, 1 RR 2d 573 (1963) and *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 18 RR 2d 1901 (1970).

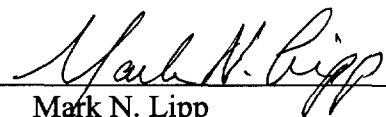
²³ See NPR Comments at 28; Public Radio for the Front Range Comments at 6; National Federation of Community Broadcasters Comments at 20; Cedarville College Comments at 3; Sound of Life, Inc. et al Comments at 9.

frequency, then the Commission should implement a point system to determine which applicant should get the channel. Points should be awarded for a finder's preference, a commitment to local programming, and a past meritorious broadcasting record. A holding period should be adopted to deter speculative applications. If the Section 307(b) evaluation fails to distinguish among NCE and commercial applicants for an unreserved frequency, then a lottery should be held among all applicants. If an NCE applicant wins the lottery, it should be granted a NCE license. If a commercial applicant wins the lottery, the license should be subjected to competitive bidding, with all applicants being eligible to participate.

Respectfully submitted,

SACRED HEART UNIVERSITY

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